SUPREME COURT, U. S.

IN THE

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MICHAEL RODAK, JR., CLE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-605

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INDEX

	Page No.
Table of Cases	ii.
Response I	1
Response II	3
Response III	13
Conclusion	16

TABLE OF CASES

Page No.

Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964)..... 3, 4

N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (C.A. 5, 1970) 9

Oliver v. Kalamazoo Board of Education, 368 F.Supp. 143, 205 (W.D.Mich.), aff'd. Nos. 74-1104 and 74-1105, Dec. 9, 1974 (C.A.6) 4, 8

Plaquemines Parish School Board v. United States, 415 F.2d 816 (C.A. 5, 1969)..... 10,11

San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973)..... 7,8,11

United States v. State of Texas, 342 F.Supp. 24, (E.D.Tex.1971), aff'd. without opinion, 466 F.2d 518 (1972)..... 4, 9

Whittenberg v. Greenville Co. School District, 298 F.Supp. 784 (D.S.C. 1969)..... 3, 9

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PETITIONERS' REPLY BRIEF

I.

The issue presented in question No. 1 of the Petition presently pending before this Court originated from a trial held pursuant to a Complaint filed by the Intervening Plaintiffs, Buckley, et al., in October of 1971. The Intervening Plaintiffs, Buckley, et al., Respondents herein, have filed no brief in opposition to the Petition for Certiorari. However, the United States, although having never filed a complaint seeking inter-district relief or challenging the constitutionality of the Uni-Gov

Statute, has now filed a Brief in Opposition urging this Court to deny review of the decision of the Court of Appeals for the reason that review at this stage of the litigation would be "premature." In so doing, the United States has not only completely reversed its position after nearly seven years of litigation, but also, by failing to disclose its prior position, it misrepresents the nature of the litigation which previously occurred thereby diluting the significance of the District Court's Findings of Fact.

At the trial of this matter in 1973, the Intervening Plaintiffs, Buckley et al., attempted to establish numerous types of inter-district violations and challenged the constitutionality of the Uni-Gov Act. Counsel for the United States was permitted to participate and did, in fact, participate in those proceedings. At the conclusion of the trial, during final argument, counsel for the United States stated:

> "* * * On the question of whether racially discriminatory conduct has been shown, our stated position has been that if the added Defendants have engaged in intra-district violations, that is, constitutional violations, that in some manner involved two or more school districts, then some relief against them may be warranted. Upon the evidence that has been presented, we are unable to discern the existence of such violations.
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> * * *
>
> "Our analysis of that legislation (Uni-Gov) persuades us that any inferences of unconstitutional purpose or effect that might be drawn on

the present state of the record would be tenuous. Moreover, there does appear to have been some legitimate interests involved which provide justification for the exemption of school districts from the Uni-Gov consolidation." (Our emphasis) (Tr. 2818-19)

The controlling finding of fact in this case is that all of the school systems located outside of the Indianapolis Public Schools were found to be operating unitary school systems; none of those school systems were found to have committed any act of de jure segregation. This finding was entered at the conclusion of a hearing wherein the issue for which this case has been remanded was fully litigated. Not one party to those proceedings, including the United States, challenged the validity of that finding on appeal; nor, did any party, including the United States, object to the Trial Court's failure to make other findings. That finding was recognized by the Court of Appeals as sufficient to compel the reversal of the District Court's Order requiring the inter-district transportation of pupils insofar as that Order pertained to school systems located outside of Marion County; it is respectfully submitted that that finding is conclusive of this entire litigation, and that it compels the reversal of the Court of Appeals insofar as it has ordered further proceedings involving the school systems located within Marion County.

II.

On Brief, the United States has cited Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964), Whittenberg v. Greenville

Co. School District, 298 F. Supp. 784 (D.S.C. 1969), United States v. State of Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd. without opinion, 466 F.2d 518 (1972), and Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich. 1973), as authority for the District Court's Order directing the Indianapolis School Board to apply for all available federal funds. These cases are easily distinguishable on their facts, or it can be shown that they are of highly questionable precedential value.

In Griffin, supra., the record could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with State and County assistance for one reason, and one reason only:

> "To insure, through measures taken by the County and the State, that White and Black children in Prince Edward County would not, under any circumstances, go to the same school. Whatever non-racial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and the grounds of race and opposition to desegregation do not qualify as constitutional." 377. U.S. at 231.

Thus, the Supreme Court's allowance of a District Court's Order that the County levy school taxes was grounded on three crucial factors. First, that the levying of local taxes to operate public schools was a method of financing expressly provided by a Virginia state law. Second, that the refusal of the County School Board to levy these taxes thereby closing the schools, was

motivated solely by a desire to operate segregated schools. Third, unless the local School Board levied local school taxes, it would be impossible to operate a non-segregated public school system in the county. In fact, there would have been no public schools.

None of these factors were present in the Indianapolis School Board's case. The use of federal funds is not the means provided for by the State of Indiana for financing public instruction. The State has no law whatever requiring that federal funds be used. In fact, the State provides ample funds for the operation of the public schools, and federal funds are merely additional or extra funds which are not necessary for the operation of the schools. Second, there is absolutely nothing in the record of the Indianapolis case remotely indicating that the refusal of the Indianapolis School Board to apply for all federal funds available was motivated by a desire to operate a racially segregated school system. There was absolutely no showing that discrimination was occurring through the failure to use federal funds, no showing that the Indianapolis Public School system did not have available local funds, and no showing that these available local funds were not being used to assist in human relations. In fact, the Indianapolis Public Schools at the time had 4,000 teachers who were daily engaged in the art of human relations, and over 70 social workers. This entire issue in the Indianapolis case was injected by the Court simply because of the philosophy of the Court. This is brought out very clearly by the Court's statement during the hearing as follows:

"I would think that people who are concerned about certain costs that you have

mentioned, on the one hand, should be interested, on the other hand, in picking up whatever the federal government has to give you, which I am sure would be well in excess of a million dollars -- probably substantially more than that - and spending it on human relations. And it is not limited to that. There is a whole category of things that you can spend it for, including modification of facilities, all sorts of things. Incredible! -- how you'd permit the taxpayers of this city to pay their taxes to the federal government, and you are entitled to get part of the (sic) back, and you just sit here and say, 'Forget it.' I don't understand that type of thinking." (Our emphasis.)

It is clear that the Court was requiring the application for federal funds for "all sorts of things," whether related to desegregation or not. And this was so, simply because the taxpayers "of this city pay their taxes to the federal government." This is further borne out by the subsequent statement of the Court at p. 129 of the Transcript of the August 20, 1973, hearing as follows:

> "*** for which you are ordered to apply forthwith, not later than Friday of this week, for all the money that you can possibly think of." (Our emphasis.)

It is therefore clear that these funds running into the millions of dollars will be expended under guidelines of the federal government, whether local officials like it or not. Furthermore, they will be expended for whatever can be thought of. It is little solace to a local official who desires to do his duty

respecting expenditures of taxpayers' money, and who desires to be frugal in that regard, to be required to spend all he can "possibly think of" and be given this honor as a "local official." Furthermore, whether the money is federal money or state money, it is still taxpayer money, and the philosophy that a local school board must spend all the federal money it can possibly get its hands on is incredible.

That this should become the basis for a federal court order is without any precedent. The Order is an unconstitutional usurpation of local authority and violates the Tenth Amendment to the Constitution of the United States. In response to this contention, the United States contends that there has been no harm shown. It is respectfully submitted that the harm is implicit in the Order. A court order which violates the United States Constitution is harmful in and of itself without further explanation. Nevertheless, there is a readily ascertainable harm in that the people of Indianapolis as a result of this order have been deprived of their right, through their duly elected representatives, to decide whether to seek federal aid or to select which federal programs they might find desirable. They are now required to seek all federal aid available without regard to what controls may follow. This Court, in San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973) held that local authorities could choose their system of school financing. This decision expressly repudiates any thought that a local governmental body must justify a failure to apply for any federal assistance, or show a specific harm to avoid losing the right to object

that the Federal Government is usurping the power of the local government. In this regard, this Supreme Court stated in San Antonio Independent School District v. Rodriguez, supra, at pages 1306-1307:

> "That is, they may believe that along with increased control of the purse strings at the State level will go increased control over local policies."

Thus, this Supreme Court, in 1973, stated that a local school board was not even required to seek state aid, much less federal aid.

Next, the United States cites the case of Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143, 205 (W.D.Mich.), aff'd., Nos. 74-1104 and 74-1105, Dec. 9, 1974 (C.A. 6), for support of its contention that a District Court has power to order a school board to apply for federal funds. In the first place, on appeal of Oliver, supra, this issue was not even discussed. Secondly, the record in the case of Oliver v. Kalamazoo Board of Education, supra, will show that the School Board voluntarily applied for federal aid and that the Order of the Court was subsequent to and merely adopted such voluntary application. Therefore, the Order of the District Court in that case was not even directed to this issue and is of no precedential value whatever. To support the arguments that the record will disclose that the application for federal funds was voluntary on the part of the Board in Kalamazoo, supra, the following language of the decision is interesting:

"Although the May 7, 1971, decision desegregation plan was somewhat modest, it was voluntarily adopted by responsible Kalamazoo school authorities in a bona fide effort to bring substantial equality of opportunity to all children in Kalamazoo as mandated by the Constitution. Since the Kalamazoo authorities were responsibly performing their constitutional duties when they adopted the May 7 Plan, this Court has also adopted it as the basis for its remedy." (p. 204) (Our emphasis.)

Next, the United States cites in a footnote at page 10 of its Brief the case of Whittenberg v. Greenville County School District, 298 F. Supp. 784 (D.S.C. 1969). This case, decided by a three-judge panel, is not even pertinent. A cursory reading of that case shows that there was no order whatever directing the School Corporation to seek federal financial aid. The Order, which appears at pp. 790-791 of that opinion, merely directs that the school corporation try to reach an agreement with H.E.W. and absent such agreement, H.E.W. was requested to submit an acceptable plan to the Court.

Next, the United States cites the case of United States v. State of Texas, 342 F.Supp, 24, 29, 37-38 (E.D. Tex. 1971), aff'd without opinion 466 F.2d 518 (C.A. 5). An affirmance without opinion is of no precedential value under Court Rule 21. N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (C.A. 5, 1970). This case clearly states that in those cases where there is no opinion that the case has no precedential value. The pertinent language

is found at p. 972 of 430 F.2d 966, as follows:

> "By Rule 21, the Court no only implicitly assumes the responsibility for evaluating this factor, but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value." (Our emphasis.)

Upon examination of the affirmance at 430 F. 2d 973 (1970), and the original court decision at 342 F. Supp., 24, 29, 37-38, it is clear that the school districts involved and the United States had agreed upon a plan which involved application for federal funds, and asked the Court of Appeals to remand to the District Court so that the plan could be implemented. Thereafter, the parties disagreed respecting details of implementation, and the District Court merely ordered the implementation of the plan originally agreed upon. Apparently, the issue of a requirement to seek federal funds was not even presented to the Court of Appeals, or else the Court of Appeals surely would not have affirmed without an opinion on such an important issue. In any event, that case cannot be cited for precedential authority, and it is inconceivable that the Court of Appeals for the Fifth Circuit would have overruled its decision in Plaquemines Parish School Board v. United States, 415 F.2d 816 (C.A. 5, 1969), without an opinion. As set forth in Petitioners' original Brief, at p. 26, the Fifth Circuit in Plaquemines Parish School Board v. United States, supra, reversed an order identical to that complained of in the present case. In reversing, the Fifth Circuit stated what it believed to be an exception to the rule:

"This direction is without prejudice to the right of the District Court in the future in a specific situation as to specific funds to require that application be made when it is shown that the Board has failed to apply for such funds as part of a plan or scheme to impede the end of a dual system of schools, or to discriminate against Negro children." 415 F. 2d at 833.

There was absolutely no evidence whatever which would bring this case into those words of exception. Therefore, the case of Plaquemines Parish School Board v. United States, supra, was erroneously relied upon by the Government, and the Court of Appeals for the Seventh Circuit. Therefore, Plaquemines should control this decision and calls for a reversal thereof. The only other conclusion that can be drawn, is that there is now a conflict between the Seventh Circuit and the Fifth Circuit on this issue. However, the United States Court of Appeals for the Seventh Circuit seems to be relying upon the Plaquemines decision, and therefore it would seem that the decision should be reversed because of the erroneous application of Plaquemines to the present factual situation.

At this juncture, it is again appropriate to repeat the significant language of San Antonio Independent School District v. Rodriguez, supra, wherein this Court stated:

"The people of Texas may be justified in believing that other systems of school finance, which place more of the financial responsibility in the hands of the state, will result in a comparable lessening of the desired local autonomy.

That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies." 411 U.S. at 51-52. (Our emphasis.)

Of course, the same proposition applies with even greater force when viewed in the context of federal funds and increased federal control over the fiscal policies of local school systems.

In cases such as this, the federal intrusion upon local governmental powers is not limited to interference with fiscal policies, nor is it limited to the control that the federal government will be permitted to exercise over the expenditures of the funds obtained and the educational programs maintained therewith. There are significant "side effects" which go hand-in-hand with federal aid to public education. A good example of this can be seen in recent federal legislation, P. L. 93-380, passed August 21, 1974. Under these two educational amendments, entitled "Protection of the Rights and Privacy of Parents and Students," and "Protection of Pupil Rights," respectively, schools receiving federal aid are required to strictly observe numerous requirements, including but not limited to, procedures regulating the maintenance of student records and the disclosure of the contents of said records. Therefore, if the Indianapolis schools do not comply with these new requirements, they would presumably lose their federal aid and thereby be in contempt of Judge Dillin's Order. It seems the Indianapolis schools are permanently wedded to all federal aid and regulation by virtue of this Order.

The issue before this Court does not involve a dispute as to whether federal aid to education is desirable from an educational standpoint; indeed, that is one of the most controversial subjects discussed by educators throughout the nation today. Rather, this case involves the constitutional right of duly elected local school officials to choose between local funding and federal funding for the maintenance and operation of a local school system. If the decision of the Court of Appeals is allowed to stand, the constitutional rights of the Indianapolis School Board will have been judicially repealed, and the Court's decision will serve as precedent for the abolishment of similar rights presently reserved to other forms of local government with the ultimate result that the Tenth Amendment to the Constitution of the United States will have been judicially repealed in its entirety.

III.

The Board of School Commissioners of the City of Indianapolis, Petitioners herein, have alleged that the District Court erred in placing the Board in default for submitting an unacceptable desegregation plan and in appointing Court-appointed Commissioners to fashion a desegregation remedy. On Brief in Opposition, the United States has contended that a District Court has the power to reject a desegregation plan if it is found by the Court to be unacceptable. Unfortunately, the contention of the United States is not directed to the issue before this Court, and it is nothing more than an attempt to mischaracterize the question presented. Stated again, the question before this Court is directed to the propriety of a default ruling; it does not involve

the power to reject an unacceptable desegregation plan.

The specific finding which led to the District Court's ruling that the Indianapolis School Board was in default was:

> "That the Board is unable or unwilling to comply with the Order of this Court, and that to continue to order it to come forward with workable constitutional plans for desegregation would be an exercise in futility. ..." (Jt. Ap. A-106)

Clearly, the District Court concluded that either the inability to comply or the unwillingness to comply gave the Court the power to place the Board in default. The undisputed facts of this case are that it was impossible to comply with the District Court's Order for Interim Relief, and for that matter, it was impossible to comply with the District Court's Order for a comprehensive desegregation plan due to the District Court's viewpoints as to what a constitutionally acceptable plan necessitated.

As of August 18, 1971, Petitioners were found to have been operating a de jure segregated school system. In that Memorandum of Decision, the District Court also concluded that as the Black population in any given school approached forty per cent (40%), more or less, the White population residing in the geographical area serving said school would leave the area, thereby causing the school to become predominantly Black. This could be referred to as the Court's "tipping point" theory.

Interestly enough, the Black student enrollment for the entire school city of Indianapolis approximated forty per cent (40%), more or less; had these Petitioners devised a plan whereby each and every school in the system would have been racially balanced, each and every school in the system would have been at the "tipping point." However, the District Court, in its August 18, 1971, decision, held that tipping point schools are constitutionally undesirable and directed these Petitioners to prevent schools from reaching the tipping point. It follows, that it was simply impossible to devise a plan acceptable to the District Court. This was the underlying theory of the District Court's decision requiring inter-district transportation of pupils. Nevertheless, the District Court condemned the Board for failing to submit a comprehensive constitutional desegregation plan.

In regard to the Order for Interim Relief, which is the order that was the subject matter of the August 20, 1973, hearing that resulted in the Board being placed in default, the undisputed testimony was that the Board could not strictly comply with the Court's Order due to the lack of time remaining before the beginning of school and the absolute lack of adequate transportation facilities. Because of this, the Board was placed in default, and replaced by two Court-appointed Commissioners who also could not comply with that Order due to the lack of time and lack of adequate transportation facilities. However, the Board employees prepared the plan which was finally implemented, though the Commissioners were paid for it.

In summary, the undisputed evidence is that it was impossible to strictly comply with the District Court's Order for Interim Relief. Due to this impossibility, the Indianapolis School Board was placed in default. If this Petition for Certiorari is not granted, then the law of the Seventh Circuit will continue to be that a District Court can place a school board in default, replace said board by a two-man commission and thereafter require that board to expend over $60,000.00 to reimburse the commissioners for services rendered by its own staff, expenses, and attorneys' fees, simply by imposing upon that school board an order with which it is impossible to comply. It is respectfully submitted that this ruling is without precedent, and that it is certainly deserving of reversal on review.

Conclusion

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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